* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ CRIMINAL REVISION PETITION NO. 87/2007

Date of Decision : May 15, 2007

DEV RAJ ..... Petitioner

Through Mr. Subodh Markandeya, Senior Advocate with
Mr. Madhusudan Bhayana, Advocate

versus

CENTRAL BUREAU OF INVESTIGATION

..... Respondent

Through Mr. R. M. Tewari, Advocate

CORAM:
Mr. Justice S. Ravindra Bhat

1. Whether reporters of local papers may be allowed to see the judgment.? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in the Digest? Yes

<u>Mr.Justice S.Ravindra Bhat</u> (Open Court)

1. This revision petition challenges an order of the learned Special Judge, New Delhi, dated 8-1-2007, charging the petitioner of having committed offences under Section 120 B IPC and 13(2) read with 13(1) (d) Prevention Corruption

Act, 1988 (hereafter "the Act").

2. The brief facts are that a case was registered against Shri Subhash Sharma, IAS, the then Chairman, NDMC, Sh. Dev Raj, Sh. Ashok Kumar, Sh. Rajesh Kumar, Sh. Jagjeevan Kumar Sood, AE, NDMC and Sh. Vijay Kumar, alleging that 9657 sq.ft. of space on the ground floor and basement of Akbar Bhawan, Chanakyapuri, New Delhi was rented out to M/s Gesture Hotel and Food Pvt. Ltd. It was alleged that pursuant to connivance of Sh. Subhash Sharma, the then Chairman, NDMC, and other officials of NDMC misusing his official position and acting in conspiracy with the petitioner, a co-accused and others, Directors of M/s. Gesture Hotel & Foods Pvt. Ltd, favorable conditions for that company were created, by change of land use conditions, ignoring and over ruling other directions and approved allotment of space. It was alleged that pecuniary loss was caused to the public exchequer, by the use of excess space, over and above the allotted space (to M/s Gesture Hotels) and other co-accused, in the Engineering department of NDMC, abusing their official position facilitated this misdeed.

3. It was alleged that during investigation, it transpired that the Director, Estates, by letter dated 29.05.2002 wrote to Director (PR), NDMC for publishing an advertisement on 30-31.05.2002 in the five local dailies. The space in question was mentioned in Sl.No. 15 of tender notice enclosed with the letter as 9657 sq.ft. Space, at ground/lower ground floor at Akbar Bhawan, Chanakyapuri with AC

facilities and fixtures for licensable/Non licensable trade. The space was mentioned to be licensed on "As is where is Basis". The NIT was published on 30.05.2002 in the 3 local dailies. In response, the only offer received was from the petitioner, who quoted the rate of Rs. 36.99 per sq. ft. per month. The allotment-Subcommittee under the Chairmanship of Sh. Arun Baroka, Secretary, NDMC, deliberated upon the offer on 21.06.2002. and recommended that the offer of the petitioner may be accepted subject to any addition/alteration made in the premises with approval of the Chief Architect. That meeting note was put up to the Chairman, co-accused Subhash Sharma on 25.06.2002 who approved it on the same day. According to this approval, the Director (Estate) issued a letter of acceptance to the petitioner on 03.07.2002. He was asked to form a partnership/private limited company within 10 days of the receipt of the letter.

4. According to Column No. 8(i) of the tender form, the tenderer was asked to submit an option whether the contract was to be in the name of applicant or a firm or a company if the offer was ultimately accepted. The petitioner had filled this column as "proposed by partnership/private limited company". Accordingly he formed a company, viz. M/s. Gesture Hotel and Foods Pvt. Ltd; it was registered with the Assistant Registrar, Govt. of NCT Delhi on 12/7/2002. Besides the petitioner, Sh. Rajesh Kumar, Sh. Ashok Kumar and Sh. Kamal Kumar, all three sons of Sh. Dharamvir Khattar (brother of the petitioner) were appointed as

Directors of the company. Investigations also revealed that Dy. Director (Estate), Sh. Deepak Virmani by his letter dt. 22.07.2002 addressed to the Director M/s. Gesture Hotel and Foods Pvt. Ltd. asked him to contact the Executive Engineer (Civil) CBM, NDMC to take over possession of the said premises. A copy of this letter was marked to Executive Engineering (Civil), with the request that possession of the vacant space at lower ground and ground floor at Akbar Bhawan/Chankyapuri with A/c facilities and fixtures (9657 sq.ft.), may be handed over to the Director of M/s. Gesture Hotel & Foods Pvt. Ltd. He also requested for sending the handing over report showing actual covered area of the premises along with the inventory of fitting and fixtures.

5. Physical possession of the premises were handed over to M/s. Gesture Hotel & Foods Pvt. Ltd. On 23/7/2002 by Sh. Jagjeevan Kumar Sood, Asstt. Engg.(Civil) Engg. Deptt., NDMC and Sh. Vijay Kumar, Jr. Engineer (Civil) Engg. Deptt., NDMC and Sh. Vijay Kumar, Jr. Engineer (Civil), NDMC. According to CBI, the occupation report prepared by the two engineers, did not mention about the area handed over. During the course of investigations, a team comprising of Investigating Officer, the JE (Civil) CBI ACB, JE CPWD and independent witnesses measured the said space occupied by M/s. Gesture Hotel & Foods Pvt. Ltd, on 30.09.2003 in presence of two Directors of M/s Gesture Hotel & Foods Pvt. Ltd. The measurement showed that M/s. Gesture Hotel & Foods Pvt.

Ltd. was occupying a covered area of 14504.91 sq. ft. against an allotment of 9657 sq. ft. Besides this, an open space measuring 15536.69 sq. ft. on the lower ground and ground floor was also found in occupation of Ms. Gesture Hotel & Foods Pvt. Ltd. The banquet hall called 'Jewel' occupied area measuring at 9957.52 sq.ft. which was more than the allotted space of 9657 sq. ft. Apart from the banquet hall, M/s. Gesture Hotel & Foods Pvt. Ltd. also had occupied office-cum-reception room, restaurant, kitchen, two stores and parking besides open space. According to CBI, the NDMC had suffered a loss of rent of Rs. 1,88,290.19 per month, which has compounded to Rs. 22,59,482/- for a period of one year on account of occupation of extra space by M/s. Gesture Hotel & Foods Pvt. Ltd.

6. The CBI, in its charge-sheet alleged that Shri Subhash Sharma violated and over ruled the procedures in regard to approval accorded for the space. Sh. Kamal Kumar, Sh. Ashok Kumar & Sh. Rajesh Kumar also came in picture when the hotel was got registered with Assistant Registrar of Companies; the tender form was submitted by the petitioner and allotment letter was also issued in his name. It was alleged that all these acts disclosed commission of offence by the accused persons namely Sh. Jagjeevan Kumar Sood, A.E., Sh. Vijay Kumar, J.E. and the petitioner, Director of M/s. Gesture Hotel & Foods Pvt. Ltd. punishable u/s 120B IPC r/w 13(2) r/w 13(1)(d) of PC Act, 1988. The CBI alleged that it secured sanction for prosecution.

7. The Special Judge, after hearing all the parties on the point of charge, held, *inter alia,* as follows:

> *" On behalf of A-1 Devraj arguments have been addressed by Sr. Advocate Mr. Sandeep Sethi Assisted by Mr. Abhijeet, Advocate. It is stated that it tis not in dispute that the disputed premises had been let out to A-1 in terms of the NIT published in three local dailies dated 30.05.2002 and the property in question mentioned at Sl. No.15 of the Tender Notice and the space was mentioned to be on license on "as is where is basis". The possession of this property had been handed over to A-1 by NDMC on 23.07.2002 which is evident from D-18 and a perusal of the said document would clearly show that there is no column mentioned therein about the measurement of the space allotted to A-1; there is no connivance or conspiracy on the part of A-1 to have got this excess space allotted to him. Ingredients of Section 13(1) (d) of the PC Act which necessarily entail the obtainment of a valuable thing or a pecuniary advantage by a public servant either for himself or for any other person, is clearly missing in this case and the version of the prosecution in criminal law. There is no evidence of any conspiracy or meeting of the minds of the co-accused with A-1; suspicion by itself cannot take place of grave suspicion to make out a prima-facie case for framing of charge; there is no complaint by NDMC that excess land had been leased out to A-1; version of the prosecution is based on source information alone. Attention has been drawn to D-5 i.e. the letter dated 29.05.2002 wherein it is clearly stated that tenders are invited which include the present premises on "as is where is basis". Attention has also been drawn to D-8 i.e. the Tender Notice in the local Daily which clearly states that the premises has been sealed under the orders of the Delhi High Court. It is stated that in these circumstances the question of inspection or measurement of space by A-1 did not arises as the premises stood sealed under the orders of the official liquidator. Reliance has been place upon the judgment of the Hon'ble High Court of Delhi reported in DLT 124 (2005) page 16 as also another judgment of Hon'ble Courts on the basis of the catena*

of authorities clearly state that the Judge while considering the question of framing of charge under Section 227 Cr.P.C., has to make out a prima-facie case and the materials placed before the court must disclose a grave suspicion against the accused and only then the court will be justified in framing the charge; these ingredients are lacking in the case.

On behalf of A-2 Jagjivan Kumar Sood and A-3 Vijay Kumar arguments have been addressed by counsel Sh. J.r. Priani. It is argued that admittedly the NIT which is D-8 clearly states that the premises had been sealed under the orders of the official liquidator and the premises had been lease out on "as is where is basis", so the question of the measurement of the space did not arise. In view of this fact of the sealing of the property, the conspiracy on the part of A-2 and A-3 with A-1 to lease out the extra space, it thus negatived by this documents itself. It is argued that the possession had been handed over to A-1 on 23.7.02; CBI had measured the area on 30.9.03 when allegedly they found that the extra space has been leased out to A-1. It is argued that even otherwise this matter is the subject matter of a civil dispute before the Hon'ble High Court and the Hon'ble High court had granted an injunction in favour of A-1 subject to a payment of Rs. 25 lacs as an interim measure to the NDMC and the matter being sub-judice in the Civil court before the Hon'ble High Court and the injunction having been granted in favour of A-1, the question of mens rea or culpability on the part of the accused persons even otherwise does not arise.

Arguments have been heard. Record has been perused.

D-18, is the document vide which the possession had been handed over to A-1 on 23.7.02 and the occupation report has been duly signed by the Asst. Engineer Jagjivan Kumar Sood (A-2) as also by Junior Engineer Vijay Kumar (A-3). The signature of the allottee appears in the last column i.e. of A-1 of having occupies the said premises in his capacity as Director of M/s. Gesture Hotel & Foods Pvt. Ltd. Admittedly on the date when the possession was taken over by A-1, the premises was in an unsealed condition. D-8 which is the Tender Notice in the local Daily clearly states that the disputed premises have been sealed by the Official Liquidator under the orders of the

Hon'ble High Court and the allotment of the premises will be subject to the High Court releasing the same; on the date when the possession was received by A-1 i.e. on 23.7.02 the premises was in an unsealed condition and the arguments of ld. Defence counsels that the premises could not be measured as they were bore the seal of the official liquidator, finds on force in view of the fact that on the date when possession had been handed over to A-1 by A-2 and A-3 the premises were admittedly in unsealed condition and the first column of D-18 clearly stipulates the details of the particulars of the building/quarters.

The Deed of License D-9 (page 179) dated 24.9.02 executed between the NDMC and M/s. Gesture Hotel & Foods Pvt. Ltd. States that an area measuring 9657 Sq. Feet has been leased out to A-1 on license basis for a period of 10 years. This document stipulates that 9657 Sq. Feet of area has been lease out to A-1. D-19 however, clearly negatived this position and the actual area in occupation with A-1 shows that it is 14,504.91 Sq. Feet; this measurement was carried out on 30.9.03. Statements of PW 10 Sh. Umesh Vashisht and PW 9 Sh. Rakesh Dutt who had carried out the measurement in the presence of independent witnesses PW 7 Sh. Anurag Verma and PW 8 Sh. Dhirender Bhader Singh are also relevant in this regard. This document D-19, clearly states that the total area in occupation with A-1 is 14,504.91 Sq. Feet.

The prima-facie conspiracy on the part of A-2 and A-3 to abuse their official position as public servants to enable A-1 to obtain a pecuniary advantage, is thus borne out. There is sufficient material to frame charge against all the accused persons.

Charge under Section 120 B IPC and 13(2) read with 13(1) (d) PC Act be framed against all the accused persons.

Substantive charge under section 13(2) read with 13(1)(d) PC Act be also framed against A-2 and A-3."

8. Mr. Subodh Markandeya, learned senior counsel submitted that a fair

reading of the only two documents relevant in point of time, viz the letter dated 29-5-2002 (D-5) and the Tender Notice (D-8) would disclose that the NDMC did not commit itself to any particular area, for licensing; on the other hand, at all relevant times, the parties concerned were told that the premises were available on "as is where is" basis. In these circumstances, the suspicion of connivance could not have been the sole foundation for the charges. Reliance was also placed on D-18 to say that no column was shown, to establish the area, or that the petitioner obtained the premises by practising deception. It was submitted that the petitioner, as a director of the licensee company had no control in the handing over of the premises.

9. Learned counsel contended that the petitioner could not have been charged with the commission of the offences, as the materials were not sufficient to raise a "grave suspicion". Counsel contended that the company which entered into the arrangement did so after the application made on its behalf, legitimately, was considered the highest bid. There was nothing illegal or improper in this transaction. It was also submitted that the exact area could not have been ascertained, because the premises at the time of advertisement were sealed; merely because more area was handed over no inference of *mens rea* to commit a crime or offence could be drawn. The area was in fact handed over on "as is where is" basis.

10. In addition to D-5 and D-8, the CBI had placed reliance on other documents, to support its allegation that the petitioner and co-accused consciously made reference to 9657 square feet and that the petitioner could not claim ignorance in this regard. D-15 (dated 22-7-2002) was one such document; it read as follows:

> *"It may be noted that the licence fee of the said premises measuring 9657 sq. ft. has already commenced from 12.7.2000 at the rate of Rs. 3,57,212.43 p.m. Besides Rs. 17861/- p.m. Towards the cleanliness, maintenances along with sanitation and security charges."*

Similarly, D-13, the allotment letter addressed to the petitioner, who had applied pursuant to the advertisement, to the extent it is relevant, is extracted below:

> *"Dear Sir,*
>
> *With reference to your tender application dated 18.6.2002 for allotment of the above subjected shop, you are hereby informed that it has been decided to accept your offer of Rs. 36.99 per sq.ft. Per month (Rs. 357212.43 PM).*
>
> *You are, therefore, allotted the above mentioned unit measuring 9657 sq. ft. on monthly licence fee of Rs. 375073/- PM (Rs. 357212.43 plus its 5%) and Rs. 17861/- PM in addition as cleanliness & maintenance along with sanitation and security charges on licence basis for a period of 10 years subject to enhancement of licence fee by 10% every year on the terms and conditions mentioned in the tender and already agreed to by you. Your are permitted to run the trade of Restaurant-cum-Banquet and Allied Trades..."*

11. The petitioner in fact received possession; this is evidenced by D-18. It is

dated 23.7.02; the occupation report was signed by the Asst. Engineer Jagjivan Kumar Sood (A-2) as also by the Junior Engineer Vijay Kumar (A-3). The signature of the allottee, viz the petitioner A-1 appears in the document. The occupier acknowledged having occupied the premises in the capacity of Director of M/s. Gesture Hotel & Foods Pvt. Ltd. There is no dispute that on the date possession was taken over by the petitioner, the premises were in an unsealed condition.

12. In *State of Bihar v. Ramesh Singh* AIR 1977 SC 2018, it was held :

> *"Reading Ss. 227 and 228 together in juxtaposition, as they have got to be, it would be clear that at the beginning and the initial stage of the trial the truth, veracity and effect of the evidence which the prosecutor proposes to adduce are not to be meticulously judged. Nor is any weight to be attached to the probable defence of the accused. It is not obligatory for the Judge at that stage of the trial to consider in any detail and weigh in a sensitive balance whether the facts, if proved, would be incompatible with the innocence of the accused or not. The standard of test and judgment which is to be finally applied before recording a finding regarding the guilt or otherwise of the accused is not exactly to be applied at the stage of deciding the matter under S. 227 or S. 228 of the Code. At that stage the Court is not to see whether there is sufficient ground for conviction of the accused or whether the trial is sure to end in his conviction.*
>
> *Strong suspicion against the accused, if the matter remains in the region of suspicion, cannot take the place of proof of his guilt at the conclusion of the trial. But at the initial stage if there is a strong suspicion which leads the Court to think that there is ground for presuming that the accused has committed an offence then it is not open to the Court to say that there is no sufficient ground for proceeding against the accused...."*

These principles were reaffirmed in *Union of India -vs Prafulla Chandra Samal* AIR 1979 SC 363. The decision of the Supreme Court in *State of Maharashtra -vs- Som Nath Thapa* 1996(4) SCC 659 had ruled that the test of *prima facie* case is the one which has to be applied at the stage of framing of the charges; the court is not expected to and indeed does not have the jurisdiction to conduct a pre-trial by weighing the evidence on a scale. All that it can do is to examine the materials and see whether *prima facie* the materials on record point to the accused having committed the offences alleged or any offence at all.

13. In view of the above discussion, the nature of materials available with the trial court, particularly the documentary evidence, *prima facie* could lead to inference that the petitioner was guilty of the offences he was charged with. The soundness of his explanation, or the fact that premises were measured during investigation, are matters on which evidence has to be considered and examined; they are also defences, which cannot be properly considered by the court framing charges.

14. In the foregoing premises, I find no infirmity with the order of the trial court. This petition, therefore, fails and is dismissed. No costs.

S. RAVINDRA BHAT, J

DATED 15th May, 2007 **JUDGE**